INTERPRETATION, LAW AND THE CONSTRUCTION OF MEANING

INTERPRETATION, LAW AND THE CONSTRUCTION OF MEANING

Collected Papers on Legal Interpretation
in Theory, Adjudication and Political Practice

by

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INTRODUCTION

ANNE WAGNER, WOUTER WERNER AND DEBORAH CAO

Semiotic theories have emphasized the contextual and dynamic nature of meaning and knowledge. As one of the founding fathers of semiotics has argued, all meaning emerges in a triadic structure, where a 'sign stands for an object, not in all respects, but in reference to a sort of idea ... the ground'.¹ This understanding of the construction of meaning rules out the possibility of a fixed foundation of knowledge. All knowledge is mediated by a sign, which can only be interpreted by reference to yet another sign, its ground. In the same fashion, legal semiotics has emphasized the dynamic character of legal concepts and stressed the importance of interpretation and the construction of meaning. In response to new problems, changing power structures, changing societal norms and new faces of injustice, established doctrines are reconsidered, reformulated and partly replaced by competing doctrines and hypotheses.²

The open and conjectural nature of legal knowledge raises some foundational questions regarding the nature and function of law. How is, for example, the openness of legal rules to be reconciled with the quest for final authority? Who has the power to define words and concepts in a concrete case? How is the construction of meaning in law affected by societal discourses? Such questions are closely related to the central topic of this volume: the problem of legal interpretation and the construction of meaning within and through law.

The contributions to this volume are based on a selected number of papers that were presented at the 2004 International Roundtable for the Semiotics of Law in Lyon. The contributions reflect the connectedness, as well as the diversity, of the community of legal semioticians. While all contributions deal with issues of interpretation and the construction of meaning, the fields of application as well as the theoretical underpinnings of the contributions are broad. We hope that this 'diversity in unity' will contribute to a fruitful discussion on the foundations and application of semiotic theories of law.

¹ Charles Sanders Peirce, *Collected Papers* (Cambridge: Harvard University Press, 1931-1935), Vol. II, at 34.

² See for an analysis of the dynamics of law and legal interpretation Roberta Kvelson's seminal work, *The Law as a System of Signs* (New York: Plum Press, 1988).

Part I of this volume discusses the problem of legal interpretation from a more general, theoretical perspective. The four chapters in this part discuss the topic of legal interpretation from different, yet overlapping perspectives: institutionalism (van Schooten), contextualism (Charnock), legal rhetoric (Soboleva) and communicative rationality (Cao). All four chapters explicitly relate the problem of interpretation to the notion of intersubjectivity and emphasize that legal interpretation is embedded in wider social practice. Thus, van Schooten examines the importance of common societal beliefs that shape the law to law and structure the interplay between legal rules, the application of those rules and social interaction. In a similar fashion, Charnock criticizes the literal rule of construction and argues that the content of legal rules is established by consensus in the relevant community. Soboleva sets out how *topoi*, or commonplaces, guide legal reasoning and function as constraining and disciplining structures. Finally, Cao takes up the Habermasian notion of communicative rationality to explain legislative and judicial acts. By contrast to approaches to (legal) speech acts that derive meaning primarily from intention, Habermas stresses the importance of intersubjectivity and acceptability, thus echoing the Piercian reading of the relation between the construction of meaning, intersubjectivity and rationality.³

The notion of intersubjectivity also figures prominently in Part II of this volume that deals with the problem of interpretation in judicial reasoning. In Chapters Five, Six and Seven, Baldwin, Henket and Azar, discuss respectively one of the most delicate topics related to the application and interpretation of law: the construction of legally relevant facts in legal proceedings. In several respects, Baldwin and Henket take different positions towards the role and construction of facts in legal proceedings, as may be inferred from the respective titles of their contributions: ‘Who needs fact when you got narrative?’ (Baldwin) and ‘Taking facts seriously’ (Henket), whereas Azar, in his paper, approaches judicial reasoning from a different angle: in terms of ambiguity and indeterminacy⁴ where law and language often intercept. Indeed, Azar

³ See for example Habermas’s discussion of Pierce in J. Habermas, *Texte und Kontexte*, Suhrkamp (Frankfurt: a.M., 1991).

⁴ For more information, see L. Solan, ‘Vagueness and Ambiguity in Legal Interpretation’, 73-96, in J. Engberg, M. Gotti, V. Bhatia and D. Heller (eds.), *Vagueness in Normative Texts* (Bern: Peter Lang, coll. Linguistic Insights, 2005), vol. 23, A. Wagner, ‘Semiotic Analysis of the Multistage Dynamic at the Core of Indeterminacy in Legal Language’, 173-200, in J. Engberg, M. Gotti, V. Bhatia

insists that these are crucial features in legal discourse analysis where the role of ‘de-vaguefying’ or ‘desambiguation’ still remains crucial for the interpreters. Azar argues that judges tend to adopt an anti-pragmatic approach in such disputed cases treating them as cases of vagueness instead of what they actually are, that is, cases of ambiguity. In their contributions, Baldwin and Henket give concrete analyses to legal interpretation and both agree on two important points. First, judges and juries base their decisions on the most convincing narrative of facts - on narrative coherence rather than on ‘correct representation’ as such. Second, such a semiotic understanding of judicial practice does not rule out the possibility of critique. Notions such as due process, communicative rationality or accuracy do not lose their meaning in non-positivistic readings of judicial reasoning.

Part III of this volume takes up the interplay between law and globalization and the role of law in (international) politics and thus touches upon the question of who is able to define legal words and concepts in concrete circumstances. The power to define has played a crucial role in the formation of Latin-American States, as the contributions of Benavides Vanegas and Virtanen demonstrate.

Benavides Vanegas discusses how the fight for independence, as well as the conceptualization of ‘the nation’, in Colombia was shaped by the ‘coloniality of power’ and the dominant European legal and political concepts. The initial struggles for independence, Benavides Vanegas argues, should be interpreted as struggles for equality within the Spanish nation, while the later process of nation building was based on a logic of inclusion and exclusion that can only be understood in terms of predominant racial definitions and hierarchies. Without a proper understanding of the coloniality of power, current discussions on nationalism in the era of globalization start from the wrong place. The chapter by Virtanen shows how in the Brazilian Amazon, economic globalization and integration in an authoritarian central State have reshaped local cultures and disciplined local populations. However, Virtanen’s

and D. Heller (eds.), *Vagueness in Normative Texts* (Bern: Peter Lang, coll. Linguistic Insights, 2005), vol.23.

James B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston/Toronto: Little Brown, 1973), Brian Bix, ‘Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?’ (2003) *Ratio Juris* 16: 281-295.

chapter also warns against simplistic, unidirectional interpretations of the process of globalization. Based on Lotman's semiotics of borders and identity, Virtanen argues that 'current international relations are characterized by interpenetration of different normative systems' and could in some areas – such as international certification – lead to 'interesting alternative(s) to the prevalent forms of unidirectional and homogenising globalization.' Agnes Schreiner, on the other hand, deals with the willingness of Aborigines to demonstrate the struggle for their rights and their 'traditional connection to the land' in Australia, analyzing their art of memory which is 'a big play of combinatorial exchanges'. She insists on, and grounds this argument, in the deep semiotic analyses of two particular landmarks, i.e., the Manggalili and the Djarrakpi.